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SUPREME COURT, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,

Petitioner,

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether an appellate court may deliberately depart from this Court's and other circuits' precedents on the issue of whether the citizenship of the administrator or beneficiaries controls in a wrongful death action?

(2) Does a circuit court's refusal to follow other circuits' views constitute a denial of equal protection of the law?

(3) Should this court exercise supervisory authority to lessen the incidence of intercircuit conflicts?

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CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 7th Circuit entered on December 16, 1985, to resolve the intercircuit conflict and conflict with this Court's decisions on the issue presented herein.

OPINION BELOW

The judgment at issue and dissenting opinions are reported at ___ F.2d ___ and are reproduced in the appendix hereto. An earlier opinion by the 7th Circuit was not published but is reproduced in the Appendix. The Trial Court's opinion was not published but is also reproduced in the Appendix hereto.

JURISDICTION

The decision of the panel of the 7th Circuit was issued on August 9, 1985. It was amended by the Court on December 16, 1985. A timely Petition for Rehearing *en banc* was denied on December 16, 1985 with Judges Posner, Easterbrook and Eschbach dissenting. This Court's jurisdiction is invoked pursuant to 28 U.S.C., §1254(1).

APPLICABLE STATUTES

The text of 28 U.S.C. §1359 and Illinois' Special Administrator statute applicable in wrongful death actions *Ill.Rev.Stat.* c. 70, § 2.1 is set forth in the Appendix to this brief.

STATEMENT OF THE CASE

This is an action by Krista Wilsey, an Iowa resident, against three Illinois physicians for the wrongful death of her four (4) year old daughter, Lacey Hammel. At the time of filing suit, Lacey Hammel's father was an Illinois resident. Krista Wilsey was named by the federal district court to be a special administrator of the estate of her daughter pursuant to Illinois' Wrongful Death Act Special Administrator statute, *Ill.Rev.Stat.* c. 70, § 2.1.[1] No question of lack of diversity jurisdiction was raised in the trial court. (A-18). Instead, the three defendants filed motions to dismiss arguing that under §2.1 an Illinois resident had to be named as Special Administrator of the estate, and that a federal court had no authority to appoint a Special Administrator pursuant to §2.1. The trial court found that a federal court did have authority to appoint a Special Administrator but ruled that the special administrator had to be an Illinois resident and consequently dismissed the suit. (A-19)[2]

In the 7th Circuit, the panel issued an order on April 17, 1985, which did not rule on the trial court's appointment of an Iowa resident to be a Special Administrator under Illinois law and Rule 17 of the Federal Rules of Civil Procedure. (A-14) Instead, the 7th Circuit *sua sponte* noted a lack of diversity jurisdiction because it appeared that one of the three beneficiaries of Lacey Hammel's estate was an Illinois resident. The Court remanded the matter back to district court to determine the citizenship of Lacey Hammel's father, Jeff Hammel. (A-14).

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1. The text of *Ill.Rev.Stat.* c. 70, §2.1 is set forth in the appendix.

2. After the trial court dismissed this law suit and before the notice of appeal was filed, Lacey Hammel's father filed a wrongful death action in state court to guard against the possibility of not having any remedy for the wrongful death. If federal court jurisdiction is upheld, the state court suit will be dismissed.

On remand to the district court, Plaintiff's counsel acknowledged Jeff Hammel's Illinois citizenship and contemporaneously filed a motion for reconsideration with the 7th Circuit panel. That motion urged the traditional rule, followed by this Court and every other circuit, that the citizenship of the administrator controls diversity rather than that of the beneficiaries. The motion also argued that it was unfair to decide a question of jurisdiction *sua sponte* without benefit of any briefing by the parties. The panel then ordered the Defendants to file a response. On August 9, 1985, the 7th Circuit issued a final order adhering to but amplifying upon its earlier expressed views that the citizenship of the beneficiaries controls diversity rather than that of the administrator. (A-8).

Plaintiff then filed a petition for rehearing and rehearing *en banc*. On December 16, 1985 that petition was denied with Judges Posner, Eschbach and Easterbrook dissenting. In his dissent, Judge Posner notes that the position taken by the 7th Circuit in this case is contrary to this Court's decision in *Navarro Savings Assn. v. Lee*, 446 U.S. 458 (1980) and to the position followed by "most, perhaps all, other courts of appeals". He and Judges Eschbach and Easterbrook would have granted rehearing *en banc* to resolve the conflict with the other circuits and with this Court. (A-3, 7)

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

Granting a writ is warranted to resolve the intercircuit conflict between the 2nd, 3rd, 5th, 6th, 8th and 10th Circuits on the one hand and the 4th and 7th Circuits on the other hand. Review is likewise warranted to resolve the 7th Circuit's departure from this Court's previous decisions on the continually recurring question of whose citizenship should control in diversity actions brought by a personal representative.

Granting of a writ is further warranted to urge greater intercircuit deference to minimize disharmony in the application of federal substantive law and to rule on the constitutional dilemma posed by unequal application of federal law by the federal circuits.

I. Resolution of the Intercircuit Conflict is Required to Ensure U niform Application of Federal Law in Diversity Actions.

As set forth in Judge Posner's, Easterbrook's and Eschbach's dissenting opinion, there is a clear conflict amongst the circuits and with this Court on the issue of whether an administrator's or the beneficiaries' citizenship should control diversity in wrongful death actions. (A-4) Currently, the division of authority on this issue aligns this Court along with the views of the 2nd, 3rd, 5th, 6th, 8th and 10th Circuits on one side of the controversy and the views of the 7th Circuit and to a slightly lesser extent the 4th Circuit on the opposite side.[3]

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3. The most recent opinions of 2nd, 3rd, 5th, 6th, 8th and 10th circuits on the issue are *Bettin v. Nelson*, 744 F.2d 53 (8th Cir. 1984); *Bianca v. Parke-Davis Pharmaceutical Div.*, 723 F.2d 458 (5th Cir. 1984); *Gross v. Hougland*, 712 F.2d 1034 (6th Cir. 1983) *cert. den.* 465 U.S. 1025 (1980); *Hackney v. Newman Memorial Hospital*, 621 F.2d 1069, 67 ALRF 456 (10th Cir. 1980) *cert. den.* 449 U.S. 982 (1980); *Field v. Volkswagen, A.G.*, 626 F.2d 293 (3rd Cir. 1980); *Groh v. Brooks*, 421 F.2d 589 (3rd Cir. 1970); *O'Brien v. Avco.*, 425 F.2d 1030 (2nd Cir. 1969).

The 10th Circuit's views expressed in *Hackney* are slightly different from the foregoing opinions. In *Hackney* the 19th Circuit held that even if there was a purpose to manufacture diversity jurisdiction the administrator's citizenship will govern diversity as long as the administrator chosen has a beneficial interest in the proceeds.

The 7th Circuit opinions are this case and its earlier decision in *Betar v. DeHavilland Aircraft of Canada*, 603 F.2d 30 (7th Cir. 1979).

The 4th District's numerous views on the subject appear in *Krier-Hawthorne v. Beam*, 728 F.2d 658 (1984); *Messer v. American Gens, Inc.*, 612 F.2d 1367 (4th Cir. 1980), *cert. denied*, 446 U.S. 956, (4th Cir. 1980); *Sadler v. New Hanover Memorial Hospital, Inc.*, 588 F.2d 914 (4th Cir. 1978); *Mullins v. Seals*, 562 F.2d 326 (4th Cir. 1977); *Vaughan v. Southern Railway Company*, 542 F.2d 289 (4th Cir. 1976); *Bishop v. Hendricks*, 495 F.2d 289 (4th Cir. 1974), *cert. denied*, 419 U.S. 1056 (1974); *Miller v. Perry*, 456 F.2d 63 (4th Cir. 1972); *Lester v. McFaddon*, 415 F.2d 1101 (4th Cir. 1969).

This Court has always declared that an administrator's citizenship should control diversity rather than the beneficiaries' citizenship in an action brought on behalf of an estate. *Chappedelaine v. Dechenaur*, 4 Cranch 306, 2 L.Ed. 629 (1808); *Childress v. Emory*, 8 Wheat 642, 5 L.Ed. 705 (1823).

In *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931) this Court clearly reiterated this view.

> "It is settled that the federal courts have jurisdiction of suits by and against executors and administrators if their citizenship be diverse from that of the opposing party, although their testators or intestates might not have been entitled to sue or been liable to suit in those courts for want of diversity of citizenship. *Childress v. Emory*, 8 Wheat. 632, 5 L. ed. 705 . . .
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> * * *
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> The petitioner insists that where an administrator is required to bring the suit under a statute giving a right to recover for death by wrongful act, and is, as here, charged with the responsibility for the conduct or settlement of such suit and the distribution of its proceeds to the persons entitled under the statute, and is liable upon his official bond for failure to act with diligence and fidelity, he is the real party in interest and his citizenship, rather than that of the beneficiaries, is determinative of federal jurisdiction. This we think is the correct view. The applicable statutes make the administrator the trustee of an express trust and require the suit to be brought and controlled by him." *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 52 S.Ct. 84, 76 L.Ed. 233, 237 (1931).

This same view was reiterated again by this Court in the context of a business trust six years ago in *Navarro Savings Assn. v. Lawrence F. Lee*, 446 U.S. 458 (1980).

> ". . . a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others.
>
> * * *

> They have legal title; they manage the assets; they control the litigation. In short, they are real parties to the controversy. For more than 150 years, the law has permitted trustees who meet this standard to sue in their own right . . ." *Navarro Savings Assn. v. Lee*, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425, 431, 432 (1980).

Notwithstanding these clear pronouncements of this Court, the 7th Circuit in this case and in its earlier decision of *Betar v. DeHavilland Aircraft of Canada*, 603 F.2d 30 (7th Cir. 1979) has taken a deliberately contrary position. The 7th Circuit holds that the citizenship of all the beneficiaries controls diversity rather than that of the administrator, even if there was no motive to manufacture diversity.

> "We are fully aware that the Tenth Circuit has disagreed with the *Betar* analysis, finding that a personal representative, whose duties are to bring the wrongful death action, conduct the litigation, and distribute the proceeds, is not merely a nominal party. *Hackney v. Newman Memorial Hospital, Inc.*, 621 F.2d 1069, 1071 (10th Cir. 1980). We are, however, bound by this circuit's precedent unless that precedent is later determined to be erroneous.
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> * * *
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> Where the personal representative's role under state law is that of a nominal party, the citizenship of the beneficiaries controls. Merely because one of the beneficiaries seeks appointment as the personal representative does not dispense with consideration of the citizenship of the other beneficiaries. Complete diversity between the beneficiaries and the defendants is required." *Wilsey v. Eddingfield*, (A-10-11, 12-13)

The 4th Circuit's position is also contrary to this Court's decisions in *Mecom* and *Navarro* in that it holds that unless an administrator holds a substantial beneficial interest in the outcome of the case the citizenship of the beneficiaries will control diversity even if there was no motive to manufacture jurisdiction. *Miller v. Perry*, 456 N.E.2d 63 (4th Cir. 1972); *Bishop v. Hendricks*, 495 F.2d 289 (4th Cir. 1974), *cert. den.* 419 U.S. 1056

(1974). But compare *Krier-Hawthorne v. Beam*, 728 F.2d 658 (4th Cir. 1984) which rejects the *Miller* and *Bishop* views if the administrator is named as a defendant.

The 4th Circuit's position rejecting consideration of the citizenship of the administrator in cases where there was no motive to manufacture diversity jurisdiction has been explicitly rejected recently by the 5th and 6th Circuits in *Bianca v. Parke-Davis Pharmaceutical Div.*, 723 F.2d 392, 398 (5th Cir. 1984) and in *Gross v. Hougland*, 712 F.2d 1034, 1039 n. 10 (6th Cir. 1983) *cert. den.* 465 U.S. 1025 (1984) and implicitly rejected in *Bettin v. Nelson*, 744 F.2d 53 (8th Cir. 1984). All of these courts have held that the administrator's citizenship should control diversity unless there was an explicit purpose to manufacture diversity. But, unlike the 5th, 6th and 8th Circuits, the 10th Circuit holds that a motive to manufacture diversity jurisdiction is irrelevant to the administrator's citizenship controlling diversity if the administrator has a beneficial interest in the outcome of the case. *Hackney v. Newman Memorial Hospital*, 621 F.2d 1069, (10th Cir. 1980) 67 ALRF 456, *cert. den.* 449 U.S. 982.

The genesis of all of these divergent opinions is this Court's opinion in *Kramer v. Caribbean Mills*, 394 U.S. 823 (1969). There in a footnote, this Court raised but did not resolve the question whether an administrator's citizenship would control diversity where there was a purpose to manufacture diversity.

> "Nor is it necessary to consider whether, in cases in which suit is required to be brought by an administrator or guardian, a motive to create diversity jurisdiction renders the appointment of an out-of-state representative 'improper' or 'collusive.' See, e.g., *McSparran v. Weist*, 402 F.2d 867 (1968); *Lang v. Elm City Constr. Co.*, 324 F.2d 235 (1963); *County of Todd v. Loegering*, 297 F.2d 470 (1961); cf. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 52 S.Ct. 84, 76 L.Ed. 233, 77 ALR 904 (1931). Cases involving representatives vary in several respects from

> those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in state court; (2) under state law, different kinds of guardians and administrators may possess discrete sorts of powers; and (3) all such representatives owe their appointment to the decree of a state court, rather than solely to an action of the parties. It is not necessary to decide whether these distinctions amount to a difference for purposes of § 1359." *Kramer v. Caribbean Mills*, 394 U.S. 823, 89 S.Ct. 1487, 23 L.Ed.2d 9, 14, n. 9 (1969)

But *nowhere* in *Kramer* did this Court ever suggest that an appellate court could dispense with the traditional rule that an administrator's citizenship controls diversity in the absence of collusion. Here the child's mother was appointed as administrator and there is obviously no question of a collusive appointment.

In *Navarro Savings Assn. v. Lee*, 446 U.S. 458 (1980) this Court reiterated the rule that the administrator's citizenship controls diversity with regard to trustees who possess certain "customary powers to hold, manage and dispose of assets for the benefit of others" in the case of business trusts. Under Illinois law, as under most wrongful death or probate statutes, the personal administrator has those same explicit powers of holding legal title, managing assets, and controlling the litigation referred to in *Navarro* at 446 U.S. 465 (1980). See Judge Posner's dissent from rehearing *en banc* at (A-3) and *Rogers v. Consolidated Railroad Corp.*, 136 Ill.App.3d 191, 482 N.E.2d 1080 (4th Dist. 1985).

Notwithstanding this Court's recent decision in *Navarro*, the 7th Circuit's decision here has chosen to ignore it and announce a contrary rule that beneficiaries' citizenship will be controlling in diversity cases regardless of the circumstances. This deliberate departure from both this Court's recent *Navarro* opinion and its earlier precedent in *Mecom* poses a serious threat to this Court's authority and legitimacy.

Supreme Court review is mandated to resolve this conflict with this Court's own decisions as set forth in Supreme Court Rule 17(c) as well as to resolve the conflict with the decisions from the 2nd, 3rd, 5th, 8th and 10th Circuits.[4] Unless the divergent views taken by the 7th Circuit and the 4th Circuit are resolved by the Supreme Court, the bench and bar will continue to struggle over what this Court has noted should be "a matter of relative simplicity" and "as self-regulated as breathing". *Navarro* at 446 U.S. 464, n. 13. Obviously the question of whether the administrator's or beneficiaries' citizenship controls diversity will continue to recur in every wrongful death diversity case filed in the federal courts. The extent of the conflict is demonstrated by more than a dozen Court of Appeals decisions on the same issue in the last ten years.[5] This mountain of litigation will be exacerbated by the 7th Circuit's decision here because it is the first decision ever to hold that the beneficiaries' citizenship is controlling regardless of the circumstances. Now every court of appeals and district court in the nation will be faced by arguments to change existing law on diversity jurisdiction based on the 7th Circuit's precedent in this case. It will lead to protracted delays in diversity suits; it will lead to unseemly opportunities for forum shopping amongst the circuits and it will pose difficult dilemmas for federal judges in trying to ascertain which of the obviously conflicting precedents is controlling.

Even if the 7th Circuit's holding were not in conflict with this Court and all of the other circuits, Supreme Court review would be warranted because the 7th Circuit's holding that the beneficiaries' citizenship controls diversity will create chaos throughout the federal courts. Not only does each state differ in who might be defined as beneficiaries under their respective

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4. See note 3 *supra* at p. 5 of this brief for a complete list of the most recent conflicting decisions from each of these circuits.

5. See note 3 *supra* at p. 5 of this brief.

wrongful death acts, but also in many states, such as Illinois, there must be an evidentiary determination as to whether a collateral or lineal next of kin might qualify as a beneficiary depending upon his degree of "dependency" upon the decedent. See eg. *Ill.Rev.Stat.* ch. 70, §2. *Matter of Estate of Griffy*, 64 Ill.App.3d 504, 381 N.E.2d 755 (5th Dist. 1978) In cases involving trusts and trustees, beneficiaries might be equally difficult to ascertain. Other beneficiaries might be unknown or lost. Surely the federal courts should not be required to engage in this type of detailed evidentiary inquiry to determine who are the qualified beneficiaries merely to ascertain whether a federal or state court has jurisdiction to hear the case. See Posner's dissent at A-6. In *Navarro*, this Court noted that there should be a simple rule for determining citizenship in the diversity cases. To compel the federal courts to engage in this type of detailed evidentiary inquiry might push to the breaking point the already overburdened federal courts.

II. A Writ Should be Granted to Urge Greater Deference Between the Circuits and Thereby Lessen this Court's Workload.

As noted in the dissent of Judges Posner, Eschbach and Easterbrook, the decision reached by the 7th circuit here is in conflict with that reached by every other circuit considering the issue. What justification is there for this conflict? Is there anything peculiar about the 7th Circuit that requires a different rule in diversity cases than that which prevails elsewhere? Surely not. The 7th Circuit's recalcitrant views can only lead to injustice to 7th Circuit Court litigants and chaos and proliferation of litigation throughout the nation.

Several commentators have noted that this Court could eliminate or minimize intercircuit conflicts by promulgating a rule or decision to minimize those conflicts.

> "What is serious is the case of the deliberate consideration and rejection of the opinion — even the en banc opinion

> —of one court of appeals by another. Those deliberate conflicts can be eliminated or reduced to manageable proportions without the necessity for more courts.
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> ° ° °
>
> By rule and decision the Supreme Court could require procedures that would sharply reduce the conflicts and increase the uniformity of national law. A Supreme Court rule could provide that the first panel decision of a court of appeals would establish the proposition for all of the courts of appeals, just as it now does for all subsequent three-judge panels within the circuit and for all of the district courts within the circuit. That decision would remain controlling until it is overruled en banc by a court of appeals, either that or another circuit. That en banc decision would control until overruled by the Supreme Court." Schaefer, Walter V. "Reducing Circuit Conflicts" 69 *ABA Journal*, 455 (1983)

See also William T. Coleman, "The Supreme Court of the United States: Managing its Caseload to Achieve its Constitutional Purposes" in 52 *Fordham L.Rev.* 1, 18-19 (1983). Philip B. Kurland & Dennis J. Hutchison, "The Business of the Supreme Court, O.T. 1982." 50 *Univ. of Chicago L.Rev.* 628, 638-9 (1983).

Certain circuits have recognized the need for harmony amongst the circuits to prevent needless burden on this Court.

> "Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket. Unless our 11 courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework or our national court system. See dissenting opinion of White, J., in *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014, 99 S.Ct. 626,

> 58 L.Ed.2d 687 (1978), and the opinion of Burger, J., appended thereto." *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979)

However, the 7th Circuit here, and other circuits have taken a decidedly different view.

> ". . . 'a sister circuit's reasoned decision deserves great weight and precedential value.' *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979). A reasoned decision of our own circuit, however, is just as deserving of deference. *Waterway* is such a decision, and we decline to overrule it today out of deference to our colleagues on other circuits." *Foley-Wismer v. N.L.R.B.*, 682 F.2d 770 (9th Cir. 1982)

Using this case as a vehicle to instruct the circuit courts of appeal to make efforts to reduce intercircuit conflicts by *en banc* decisions or otherwise could measurably increase the uniformity and harmony in the way federal law is interpreted throughout the United States and at the same time diminish a substantial portion of this Court's docket.[6] See Coleman *supra* at 52 *Fordham L.Rev.* 18 quoting Justice O'Connor's estimate that 23.7% of the Supreme Court's decided cases during her first term, involved conflicting lower court decisions, and Schaefer *supra* at p. 455.

The only possible criticism of this point of view could be appellate judges who might disagree with their sister courts. However, if the Court of Appeals judges disagree with the findings of their sister circuits they would always be free to state those opinions in dissenting opinions and thereby perhaps attracting Supreme Court review. But at the same time these dissenting views would not fragment the national law and lead

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6. Apparently at least two members of this Court have urged this result. See views of Justices White and Brennan cited in Coleman, 52 *Fordham L.Rev.* 18 (1983) and William J. Brennan "Some Thoughts on the Supreme Court's Workload", 66 *Judicature* 232 (1983).

to repeated litigation over what rule should prevail. See Schaefer *supra* at 455.

III. The 7th Circuit's Refusal to Follow the Decisions of Other Circuits Creates an Unconstitutional Deprivation of Equal Protection Law to all Litigants in the 7th Circuit.

Except in the states of Illinois, Indiana and Wisconsin, it is clear that an administrator is free to have her citizenship control diversity so long as she has a beneficial (4th and 10th Circuits) or noncollusive interest (2nd, 3rd, 5th, 6th and 8th Circuits) in the controversy. However, here the 7th Circuit has emphatically held that 7th Circuit Court litigants do not have this same right as exists in the other circuits. This is surely an unconstitutional discrimination by the Court system based solely on residence.

> "A court can violate equal protection and other constitutional rights by its opinions, just as a legislative body can violate constitutional rights by its statutes. When a court deliberately refuses to follow the earlier ruling of a court of coordinate authority, it creates an unconstitutional discrimination. What is involved in the 'law of the circuit' is akin to what was involved in *Erie v. Tompkins*. In that case a rule, promulgated by judges, was held unconstitutional because it subjected citizens to different rules of law depending solely upon the court in which the action was brought. The 'law of the circuit' operates in the same way: it subjects the citizens to different rules of law depending solely upon the court in which the action is brought." Schaefer, Walter V. "Foreword: Stare Decisis and the 'Law of the Circuit'", 28 *DePaul L.Rev.*, 565, 568

Just as *Erie v. Tompkins Railroad Co.*, 304 U.S. 64 (1932) condemned discrimination in the application of state law between state and federal courts, so should discrimination in the application of substantive federal law amongst the circuits be condemned here. It is quite clear that in enacting provisions for separate circuit courts of appeals in 1891, that Congress never intended those appellate courts to be bodies sovereign unto

themselves. Certainly Congress did not intend that one set of federal rules should be applicable in one part of the country and another set applicable elsewhere. Just as Congress could not enact special legislation which only applied to several selected states, the federal judiciary should not be able to make rules of general substantive applicability which are applicable only in selective states. Supreme Court review is warranted to remedy this unconstitutional discrimination by the federal judiciary.

CONCLUSION

The foregoing discussion and Judge Posner's, Eschbach's and Easterbrook's dissent indicate the existence of a clear conflict between this Court's decisions and the 7th Circuit's opinion in this case, as well as with the other circuits. Given the often recurring nature of the issue raised in this Petition, it is imperative that it be reviewed here to avoid further proliferation of the views of the circuits and denial of 7th Circuit litigants' constitutional rights to a uniform application of federal law.

The Petitioner therefore respectfully prays that a Writ of Certiorari be granted to review the decision of the 7th Circuit.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Walter J. Cummings, Chief Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge*
Hon. Richard A. Posner, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Wesley E. Brown, Senior District Judge**

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,
Plaintiff-Appellant, Cross-Appellee,

Nos. 84-2178, 84-2237, 84-2258

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,
Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 84 C 1057
Michael M. Mihm, *Judge.*

Decided December 16, 1985

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*The Honorable Jesse E. Eschbach since participating in consideraton of this case has taken senior status.

**The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation. Judge Brown did not participate in the vote on the petition for rehearing *in banc*.

ORDER

On consideration of the petition for rehearing and suggestion *in banc* filed in the avove-entitled cause by plaintiff-appellant, Krista Wilsey, individually and as Special Administrator of the Estate of Lacey M. Hammel, Deceased Minor, a vote of the active members of the court was requested, and a majority of the active members of the court have voted to deny rehearing *in banc*.[1] The order entered in this case on August 9, 1985, is amended sua sponte by the original panel by the addition of a new footnote number 1, and the renumbering of the original footnotes. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

It Is Ordered that the aforesaid petition for rehearing and petition for rehearing in banc be, and the same are hereby Denied.

1. Judges Eschbach, Posner, and Easterbrook voted to grant rehearing *in banc*, and Judges Eschbach and Easterbrook join in Judge Posner's dissent to the Order of this court denying rehearing *in banc* which follows this Order.

POSNER, *Circuit Judge*, whom ESCHBACH and EASTERBROOK, *Circuit Judges*, join, dissenting. I would grant rehearing en banc to resolve the conflict between our circuit and the other circuits over whether the citizenship of a personal representative is controlling for purposes of determining whether there is diversity of citizenship. Although a majority of my colleagues have decided not to rehear the case I hope that the next panel of this court to be seised of this issue will give serious consideration to overruling *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30 (7th Cir. 1979), on which the decision in the present case is based, in light of decisions subsequent to *Betar*.

Ordinarily the citizenship of the fiduciary who brings (or defends) a suit, rather than the citizenship of his beneficiaries, determines whether the suit can be brought in federal court under the diversity jurisdiction. This rule, derived from a line of Supreme Court decisions stretching back to 1808, was emphatically reaffirmed in *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980), decided after *Betar*. The Court in *Navarro* said: "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others." *Id.* at 464 (footnote omitted). Under Illinois law a suit on behalf of a decedent's estate is prosecuted by and in the name of a personal representative, or if the sole asset of the estate is a claim for damages for the wrongful death of the decedent, by a special administrator. See Ill. Rev. Stat. ch. 70, pars. 2, 2.1. These are fiduciaries of the estate's beneficiaries and have sole control over the litigation. A case decided since *Betar*, indeed since the panel's decision in the present case, dispels an earlier question as to whether Illinois law contained peculiarities that might enable its personal representatives and special administrators to be differentiated from their counterparts in other states for any purpose relevant to this case. See *Rodgers v. Consolidated Railroad Corp.*, 136 Ill. App. 3d 191, 193, 482 N.E.2d 1080, 1082 (1985), and compare *Hackney v. Newman Memorial Hospital, Inc.*, 621 F.2d 1069, 1071 (10th Cir. 1980).

There is of course a danger that the lawyers advising the estate or the beneficiaries might procure the appointment of an out-of-state administrator in order to be able to invoke diversity jurisdiction. If they do this they violate 28 U.S.C. § 1359, which forbids the manufacture of diversity jurisdiction. The presumption that the personal representative's citizenship controls for diversity purposes can therefore be rebutted by showing that he was appointed to enable the suit to be brought in (or removed to) federal court. Cf. *Navarro Savings Ass'n v. Lee*, *supra*, 446 U.S. at 465.

The approach I have sketched is the one that most, perhaps all, other courts of appeals follow. See, e.g., *Bettin v. Nelson*, 774 F.2d 53, 55-56 (8th Cir. 1984); *Bianca v. Parke-Davis Pharmaceutical Division*, 723 F.2d 392 (5th Cir. 1984); *Gross v. Hougland*, 712 F.2d 1034, 1037-39 (6th Cir. 1983). (The situation in the Fourth Circuit is unclear. Compare the majority and dissenting opinions in *Krier-Hawthorne v. Beam*, 728 F.2d 658 (4th Cir. 1984).) They and we have no choice, after *Navarro*. Granted, a trustee is a multi-purpose fiduciary, whereas a personal representative or special administrator is appointed precisely to represent the estate in litigation. Therefore the danger that the personal representative or special administrator will be picked with an eye to conferring diversity jurisdiction is greater than will usually be the case with a trust. The trustee will have been appointed well in advance of litigation, and the selection of the trustee will therefore be based on factors other than, or at least in addition to, obtaining an advantage in litigation. So courts must be especially alert for violations of section 1359 in cases like this; the presumption that a fiduciary is the real party for diversity purposes is easier to rebut; but the approach taken in *Navarro* is unshaken.

In *Betar*, decided as I have said before *Navarro*, we had held that since a personal representative lacks a personal stake in the litigation (for he is just the representative of the estate, i.e., of the testator's or intestate's beneficiaries), his citizenship is ir-

relevant; it is the citizenship of the beneficiaries that counts. See 603 F.2d at 35-36. It is irrelevant on this view that the appointment of the personal representative was not motivated by any purpose of conferring diversity jurisdiction.

The problem with this reasoning is that it applies with equal force to other beneficiaries, to trustees for example — who unless they are dishonest trustees have no personal stake in the assets of the trust — and is thus inconsistent with *Navarro*, which involved a trustee. *Betar* creates an arbitrary distinction between personal representatives and other trustees. Federal jurisdiction is a complicated enough field without attempting fine distinctions among types of fiduciary; at least that was the view of eight Justices in *Navarro*, who refused to distinguish between a Massachusetts business trust and an ordinary trust even though as Justice Blackmun pointed out in dissent there were significant differences between these entities. He called the majority's opinion "simplistic" and "formalistic," 446 U.S. at 475-76 (dissenting opinion); but of course it binds us.

Although the approach of *Betar* can perhaps be defended as an original matter by reference to the desirability of curtailing diversity jurisdiction and avoiding inquiries into the motive in appointing a personal representative (which perhaps shows that the quest for a simple and mechanically ascertainable test for jurisdiction is delusive in this area), and by observing that the purposes of the diversity jurisdiction are hardly served by, as in this case, allowing a federal court to determine the rights of one state resident against another, just because the trustee or representative of one of them is a nonresident, similar arguments were available, were made, and were rejected in *Navarro*. While a trustee is less likely than a personal representative to be appointed with an eye to getting an advantage in litigation, it is always possible that trustees would be switched on the eve of litigation to gain an advantage, and hence in trust cases too it will be necessary to inquire into motives in order to determine whether section 1359 has been violated. And al-

though normally a trustee has more extensive managerial duties than a personal representative or a special administrator, when and if the suit ends favorably to the plaintiff the personal representative or special administrator will have the same duties of conservation and distribution of assets that the executor or administrator of an ordinary estate has, or the trustee of a short-term trust or a trust that is winding up. In Illinois the special administrator has such duties and the personal representative doesn't, but in both this case and *Betar* the plaintiff is a special administrator, because the only asset of the estate is a wrongful death claim. The opinion in *Betar* called the special administrator a personal representative, but apparently was using the latter term loosely.

And against the approach taken in this case and in *Betar* it can be pointed out that often (though not here) it may be difficult to ascertain the citizenship of the beneficiaries, who may be numerous and in some cases unidentified. Because of the last point I am far from clear that the approach of *Betar* is correct as an original matter, for it is important that the existence or not of jurisdiction be easily determinable without exploring state inheritance law, or the decedent's family tree. But in any event *Betar* is out of step with the approach of the other circuits and, more important, seems impossible to reconcile with a recent decision by the Supreme Court. The fact that *Betar* was decided before *Navarro* is all the more reason for using this case to reexamine *Betar* in light of *Navarro*.

In this case, the named plaintiff, who seeks appointment as special administrator, is the decedent's mother and one of her three heirs; so it is not as if the lawyers had picked some unrelated nonresident, with the exclusive or primary purpose of conferring federal jurisdiction; no finding of a violation of section 1359 has been made. There are two possible problems with appointing her as special administrator, but neither provides the ground for the panel's decision, and only the second could actually support it. The first is that the plaintiff has not

been appointed by an Illinois court. Although a special administrator is ordinarily appointed by the court in which the action is sought to be filed, which in this case is the federal district court, and although federal district courts are empowered by Fed. R. Civ. P. 17(c) to appoint guardians *ad litem* for children or other legally incompetent persons in litigation before the court, the historic reluctance of the federal courts to entangle themselves in probate matters, on which see, e.g., *Dragan v. Miller*, 679 F.2d 712 (7th Cir. 1982), counsels against the appointment and consequent supervision of an estate's representative. Whether this argument should prove decisive I am not prepared to say. See *id.* at 714-16 for a general discussion of the considerations bearing on the application of the probate exception in diversity cases. But in any event, whereas the panel's decision will bar the plaintiff from ever litigating her claim in federal court, a decision holding that the court cannot appoint her the special administrator, while it would require dismissal of her suit, see *Pringle v. United States*, 419 F. Supp. 289, 291 (D.S.C. 1976), would let her repair to the Illinois courts for an appointment; and if she received it she could, but for the panel's decision, refile this suit.

The second problem is that it is unclear whether Illinois law authorizes the appointment of a nonresident special administrator for an Illinois estate (the decedent was an Illinois resident, living with her father, who has brought his own suit in an Illinois court). But the panel decision has not resolved that question either, and the answer is not obvious. So although there may be obstacles to maintaining this suit in federal court, the only obstacle the panel found is *Betar*, which we should reexamine if we are not to persist in a conflict with the other circuits and, more important, with the Supreme Court.

NOTE

The following Order was not previously published pursuant to Circuit Rule 35, but at Judge Posner's request the Order originally issued on August 9, 1985, as hereby amended, is attached hereto for publication.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Wesley E. Brown, Senior District Judge*

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,[1]
Plaintiff-Appellant, Cross-Appellee,

Nos. 84-2178, 84-2237, 84-2258

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,
Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 84 C 1057
Michael M. Mihm, *Judge.*

Decided August 9, 1985

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*The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

1. Although plaintiff-appellant, a resident of Iowa, sues in her individual capacity, she designates herself as "Special Administrator" and purports also to sue in that capacity. In her complaint she sought to have the district court exercise its diversity jurisdiction and appoint her special administrator under the Illinois statute. The district court determined that plaintiff-appellant as a

ORDER

On consideration of the motion for reconsideration filed in the above-entitled cause by plaintiff-appellant, cross-appellee Krista Wilsey, all of the judges on the original panel have voted to deny reconsideration. Accordingly,

IT IS ORDERED that the aforesaid motion for reconsideration be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that this case be REMANDED to the district court with directions to dismiss the complaint for lack of subject matter jurisdiction.[2]

Having had the full benefit of counsel's views on the jurisdictional issue presented and the district court's determination that decedent's father, like the defendants, is an Illinois citizen, we now hold that jurisdiction is lacking.

In *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 32 (7th Cir. 1979), we stated the general rule that "the citizenship of the real party in interest is determinative in deciding whether the district court has diversity jurisdiction." A party who has no significant interest in the outcome of the litigation cannot use his citizenship to transform a local controversy into one within the diversity jurisdiction of a federal court. Thus, although one serving in a representative capacity is a real party in interest in the sense that the action is properly

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non-resident could not qualify as special administrator under Illinois law and accordingly dismissed the complaint for lack of jurisdiction. The father of the deceased child, an Illinois resident, has a suit pending in state court alleging the same cause of action.

2. In an order dated April 17, 1985, we remanded this case *sua sponte* to the district court for a determination whether there was complete diversity between the parties, but retained jurisdiction of the appeal. Plaintiff-appellant Wilsey filed a motion for reconsideration and in the alternative a petition for rehearing with suggestion for rehearing *en banc*, challenging the April 17, 1985 decision and order. Because no final order had yet been issued in this case, only the motion for reconsideration is properly before us.

maintained in his name. Fed. R. Civ. P. 17(a), a representative is not necessarily the real party in interest for the purpose of determining diversity jurisdiction. *Id.* "[I]f the law of the state gives the administrator, guardian, or other representative the status of only a nominal fiduciary then the beneficiary or the ward, not the administrator or guardian, is the real party in interest, and it is the citizenship of the beneficiary or ward, as the case may be, that is determinative." 3A MOORE'S FEDERAL PRACTICE par. 17.04 (2d ed. 1985). That the touchstone of the test is a review of the representative's legal powers, rights and duties was reaffirmed in *Navarro Savings Assn. v. Lee*, 446 U.S. 458 (1980). *See also Miller v. Perry*, 456 F.2d 63, 65 (4th Cir. 1972).

In *Betar*, we analyzed the duties of a personal representative under the Illinois Wrongful Death Act, Ill. Rev. Stat. ch. 70, § 1 *et seq.*, and determined that those duties were an inadequate basis for finding the personal representative to be the real party in interest for diversity purposes.

> The Illinois Wrongful Death Act gives neither the personal representative nor the decedent's estate the right to share in the proceeds of the recovery. The representative's sole duty under the Act is to distribute the proceeds to the statutory beneficiaries in the event of recovery.

Betar, 603 F.2d at 35.[3] We therefore concluded that the personal representative lacked a "stake in the outcome" and that the statutory beneficiaries were the real parties in interest; "[t]hey are the only parties that have an actual stake in the outcome of the litigation." *Id.* We are fully aware that the Tenth

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3. There is disagreement in Illinois cases on the extent of a personal representative's role in a wrongful death action. *Compare Franciscy v. Jordan*, 43 Ill. App. 2d 344 (2d Dist. 1963) (surviving spouse, as administrator of decedent's estate, legally possessed sole right of action or control over litigation) *with Strong v. Hodges*, 344 Ill. App. 306 (2d Dist. 1951) (administrator, who is only the legal agent of the beneficiary, does not have sole and exclusive right to control suit or to compromise, settle or release cause of action).

Circuit has disagreed with the *Betar* analysis, finding that a personal representative, whose duties are to bring the wrongful death action, conduct the litigation, and distribute the proceeds, is not merely a nominal party. *Hackney v. Newman Memorial Hospital, Inc.*, 621 F.2d 1069, 1071 (10th Cir. 1980). We are, however, bound by this circuit's precedent unless that precedent is later determined to be erroneous. This is not such a case.

Wilsey nevertheless contends that *Betar* does not govern the outcome of the present suit. She reads *Betar* to hold that the beneficiaries are the real parties in interest *only* when the personal administrator lacks a personal stake in the outcome of the lawsuit. She would have us concentrate on her status as a beneficiary in conjunction with her nominal status as personal representative. She informs us that if we do not do so, we will be creating conflict with seven other circuit courts of appeals.[4] Initially, we note that *Betar's* reference to a stake in the outcome, read in context, was inextricably intertwined with its previous discussion of the duties of a personal representative under the Illinois Wrongful Death Act. The court held that the beneficiaries were the real parties in interest because the representative is only a nominal party. *Betar* neither holds nor suggests, that the citizenship of a personal representative, who under state law has only nominal duties but who by virtue of her status as a beneficiary has a stake in the outcome, is controlling for diversity purposes. This is the issue presented here.

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4. In the cases referred to by Wilsey, with the exception of two addressed later, the appointment of nonresident representatives with only nominal duties had the effect of creating facial diversity of citizenship that would not otherwise have existed, all defendants and all beneficiaries being citizens of the same state. Because each of these representatives lacked a stake in the outcome (*i.e.*, his status under state law was as a nominal party only), the appointments were viewed as violations of 28 U.S.C. § 1359. In dicta, these courts stated that if the representatives had had stakes in the outcomes, their citizenship may have controlled for diversity purposes.

Hackney is cited by Wilsey in support of her argument. In *Hackney*, the decedent, the defendants, and all beneficiaries but one were Oklahoma citizens. The daughter-beneficiary who was an Oklahoma citizen originally was appointed administrator of decedent's estate. When the estate had been fully administered and only the cause of action for wrongful death remained, the administrator resigned and the daughter-beneficiary who was a Colorado citizen was named as her successor. The latter then filed suit in federal court claiming diversity of citizenship between herself and the defendants. The Tenth Circuit found that diversity jurisdiction had been properly invoked because the administrator had a "substantial relationship" to the litigation. Two considerations led the court to this conclusion. As previously noted, the court apparently disagreed with *Betar*, *O'Brien v. AVCO Corp.*, 425 F.2d 1030 (2d Cir. 1969), and *Lester v. McFaddon*, 415 F.2d 1101 (4th Cir. 1969), that a personal representative appointed for the sole purpose of pursuing a wrongful death action is merely a nominal party. Under Oklahoma law, the administrator, to whom the cause of action belongs, has full authority to conduct the litigation; the beneficiaries have no right to settle, control or otherwise dispose of the action. The *Hackney* court further found that the administrator, by virtue of her status as a beneficiary under the Oklahoma wrongful death act, had a substantive stake in the litigation. The court's bottom line was that the appointment of a nonresident fiduciary who has a substantial beneficial interest in the litigation is immune from challenge on jurisdictional grounds. *Hackney* does not answer the question presented here. In that case, a personal representative's duties under the Oklahoma wrongful death statute were found to be more than nominal. In contrast, in this case Wilsey, as personal representative, would be merely a nominal party under *Betar*.

She has a stake in the outcome (*i.e.*, is a real party in interest) *solely* by virtue of her status as a beneficiary. But this stake is no different from that held by the two remaining beneficiaries,

one of whom is an Illinois resident. We think that the exception Wilsey asks us to create cannot withstand scrutiny. Where the personal representative's role under state law is that of a nominal party, the citizenship of the beneficiaries controls. Merely because one of these beneficiaries seeks appointment as the personal representative does not dispense with consideration of the citizenship of the other beneficiaries. Complete diversity between the beneficiaries and the defendants is required.[5]

A true Copy:
Teste:

Clerk of the United States Court of Appeals
for the Seventh Circuit

5. Our holding does not conflict with cases in which a nonresident beneficiary was named as personal representative and allowed to bring the wrongful death action in federal court. *See O'Brien v. Stover*, 443 F.2d 1013 (8th Cir. 1971); *Janzen v. Goos*, 302 F.2d 421 (8th Cir. 1962). In *O'Brien*, the nonresident fiduciary was the decedent's "sole heir." Diversity of citizenship was bona fide. In *Janzen*, the citizenship of all beneficiaries was the same as that of the nonresident surviving spouse who was appointed as personal representative.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
Argued February 21, 1985
April 17, 1985

Before
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Wesley E. Brown, Senior District Judge*

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,
Plaintiff-Appellant, Cross-Appellee,

vs.

Nos. 84-2178, 84-2237, 84-2258

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,
Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 84 C 1057
Michael M. Mihm, *Judge.*

*The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

O R D E R

In this case, we are asked to determine whether an Iowa resident may be appointed special administrator under the Illinois Wrongful Death Act, Ill. Rev. Stat. ch .70, § 2 (1983). Plaintiff Krista Wilsey, a resident and citizen of Iowa, is the mother of the decedent. Decedent was four years old and an Illinois resident at the time of her death, which allegedly resulted from negligence on the part of defendant doctors, residents of Illinois. Alleging jurisdiction under 28 U.S.C. § 1332(a)(1), Wilsey simultaneously filed two pleadings with the federal district court: a petition to have herself named as special administrator of the estate of her deceased daughter for the sole purpose of bringing a wrongful death action; and a complaint as special administrator charging defendant doctors with malpractice. Defendants responded with a motion to dismiss, arguing that a nonresident may not be appointed special administrator under the Act.

The district court apparently assumed jurisdiction under 28 U.S.C. § 1332(a)(1) on the basis of diversity of citizenship between Wilsey and the defendants, agreed with defendants that only an Illinois resident may be appointed a special administrator under the Act, denied the petition to be appointed special administrator, and dismissed the complaint for lack of jurisdiction. The first and only issue we address is the district court's jurisdiction.

The question raised is whether the district court correctly found that the uncontested diversity of citizenship between Wilsey and defendant doctors was sufficient to permit it to rule on the petition to be appointed special administrator. We think not. Wilsey contends, correctly we believe, that the district court would have had no authority to appoint a special administrator if a complaint had not been filed. Although appointment as special administrator is a prerequisite to the wrongful death action, the petition is ancillary to the complaint, the filing

of which commenced the action. Fed. R. Civ. P. 3. Upon the filing of the complaint, the district court was asked to assert its jurisdiction, if any, to entertain the wrongful death action. In testing whether jurisdiction existed, the court was required to look beyond the citizenship of the personal representative who sought to bring the action in her name.

As a general rule, the citizenship of the real party in interest is determinative in testing diversity jurisdiction. Although Rule 17(a) of the Federal Rules of Civil Procedure defines a personal representative as the real party in interest in the sense that the action may be maintained in his name alone, the rule is procedural and may not be used to extend or limit the subject matter jurisdiction of the district court.

In *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30 (7th Cir. 1979), this court held that the real parties in interest in a suit under the Illinois Wrongful Death Act are the statutory beneficiaries. It is their citizenship, not the citizenship of the personal representative, that is controlling. Diversity of citizenship between the beneficiaries and the defendants must be complete.

In this case, Wilsey's petition to be appointed special administrator makes clear that the statutory beneficiaries are herself, decedent's brother, and decedent's father. The petition further states that Wilsey is a resident of Iowa; decedent's brother is a resident of Iowa; and decedent's father is a resident of Illinois. Residence, however, is not synonymous with domicile or citizenship. For one to be deemed a citizen of a particular state, one must be physically present there and intend to remain there indefinitely. Although Wilsey's complaint alleges that she is a citizen of Iowa, the complaint contains no allegations concerning the citizenship of the other two statutory beneficiaries. She thus has failed to meet her burden of alleging and establishing jurisdiction. Although it appears doubtful that complete diversity of citizenship exists between defendants and the statutory

beneficiaries,[1] we believe it appropriate to remand this case to the district court for this jurisdictional determination as soon as may be reasonably possible.

We further believe it appropriate to retain jurisdiction of this appeal for the purpose of addressing the merits if the district court should determine that complete diversity of citizenship exists. The district court is to promptly inform this court of the result of its inquiry and appropriate steps will then be taken to dispose of this appeal.

SO ORDERED.

1. Decedent's father, alleged to be a resident of Illinois, probably cannot satisfy the physical presence requirement necessary to establish citizenship in a state other than Illinois.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

KRISTA WILSEY, individually and as special administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,

Plaintiff,

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,

Defendants.

No. 84-1057

ORDER

This is an action for wrongful death (Ill.Rev.Stat., ch. 70, §1 et seq) brought against three physicians for their alleged negligence in performing surgery on the decedent. Krista Wilsey, the decedent's mother, has petitioned this Court to appoint her as special administrator pursuant to §2.1 of the Wrongful Death Act so that she may prosecute this action. Ms. Wilsey is a citizen of Iowa and each of the Defendants is a citizen of Illinois, thus federal jurisdiction is premised upon diversity (28 U.S.C. §1332).

Defendants have sought to dismiss the action arguing that (1) this Court does not have the power to appoint a special administrator; and (2) Ms. Wilsey may not be appointed special administrator and thus this Court lacks jurisdiction. While Defendants have asserted other grounds for dismissal, the Court's resolution of these three grounds is dispositive.

Under §2.1 of the Illinois Wrongful Death Act (Ill.Rev.Stat., ch. 70, §2.1), the Court may appoint a special administrator for the deceased party to prosecute the wrongful death action. The Defendants argue that federal courts have no jurisdiction in "purely probate matters", *Rice v. Rice Foundation*, 610 F.2d 471 (7th Cir. 1979), and that this appointment is a probate matter.

However, the courts have construed the term probate very narrowly, *Rice*, 610 F.2d at 475, and will generally refrain from exercising jurisdiction only where it would interfere with probate proceedings or assume general jurisdiction of the probate. *Moore v. Lindsay*, 662 F.2d 354 (5th Cir. 1980); *Rice*, supra.

The Court does not believe that appointment of a special administrator for a wrongful death action would interfere with the probate proceeding or constitute an assumption of general jurisdiction over probate. Accordingly, the Court finds that it does have the power to appoint a special administrator in a wrongful death action.

The second issue to be addressed is whether Ms. Wilsey, as an Iowa resident, may be appointed special administrator. The Defendants argue that because the Wrongful Death Act does not provide any criteria for selection of a special administrator, reference must be made to the Probate Act, which requires that an administrator be a resident of Illinois. (Ill.Rev.Stat., ch. 110½, par. 9-1). The mere fact that the Wrongful Death Act sets forth no requirements for a special administrator does not require the Court to apply conditions found in other statutes.

However, the Court believes that, because of the relationship and reference to the Probate Act in the Wrongful Death Act, the necessity for an in-state administrator is present. Section 2.1 provides:

> "If a judgment is entered or the action is settled in favor of the special administrator, he shall distribute the proceeds as provided by law, except that if proceeds in excess of

> $1,000 are distributable to a minor or incompetent, the Court shall allow disbursements and fees to a special administrator and his attorney and the balance shall be administered and distributed under the supervision of the probate division of the Court."

This provision requires that any award be distributed as "provided by law", and any amounts distributable to a minor must be so distributed under the "supervision of the probate division of the Court". In order for the distributions to be made in accordance with the law, the person making such distributions must be subject to the jurisdiction of the Illinois courts. This is especially true in a situation where, as here, a distribution to a minor is involved, and thus must be supervised by the probate division of the court. If the special administrator is not an in-state resident, the probate division may not be able to properly supervise the distribution of the proceeds.

Accordingly, the Court finds that, under the facts of this case, Ms. Wilsey, as an Iowa resident, may not be appointed special administrator in this case. Therefore, her petition to be appointed special administrator must be DENIED. Because there is no basis for jurisdiction, the complaint must be DISMISSED.

IT IS SO ORDERED.

ENTERED: May 11th, 1984.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

ILL.REV.STAT., ch. 70, §2.1

2.1 Special administrator — Actions — Distribution of proceeds

§3. In the event that the only asset of the deceased estate is a cause of action arising under this Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to a recovery under this Act, and after such notice to the party's heirs, legatees or devisees as the court directs, and without opening of an estate, may appoint a special administrator for the deceased party for the purpose of prosecuting or defending the action.

If a judgment is entered or the action is settled in favor of the special administrator, he or she shall distribute the proceeds as provided by law, except that if proceeds in excess of $1,000 are distributable to a minor or person under legal disability, the court shall allow disbursements and fees to the special administrator and his or her attorney and the balance shall be administered and distributed under the supervision of the probate division of the court if the circuit court has a probate division.

Amended by P.A. 83-706, §33, eff. Sept. 23, 1983.

§1359. Parties collusively joined or made.

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court. 28 U.S.C. § 1359.